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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDEKI OKOH,

Defendant and Appellant.

H034614

(Santa Cruz County

Super. Ct. No. F17747)

After his motion to suppress evidence was denied, on June 30, 2009, appellant Edeki Okoh entered a plea of no contest to one count of possession of a controlled substance (crack cocaine). (Health & Saf. Code, § 11350, subd. (a).) The court placed appellant on probation for three years pursuant to the provisions of Proposition 36. (Pen. Code § 1210.1.)

Appellant filed a timely notice of appeal on August 19, 2009, "based on the denial of his motion to suppress evidence under Penal Code section 1538.5." We affirm the judgment.

*The Suppression Hearing*

At approximately 8:00 p.m. on March 25, 2009, Santa Cruz Police Officer Matthew Mulvihill responded to a report of a "domestic disturbance" between a male and a female at 200 Button Street in the City of Santa Cruz. Officer Mulvihill had

information that the male involved in the disturbance was a "black male adult" about 20 years old, five feet 10 inches tall and heavy set, wearing a blue striped shirt and blue jeans.

When Officer Mulvihill arrived at an apartment complex parking lot and got out of his car, he "could hear people yelling at the top of their voice[s]." Two women "frantically" pointed in the direction of the east side of a building. As Officer Mulvihill walked up the sidewalk he saw Officer Hillier giving commands to a "subject" who was lying face down with his arms extended outwards. Three other "subjects" were on a nearby stairwell; they appeared to be yelling at Officer Hillier.

Officer Mulvihill identified appellant as the male on the ground and as matching the description of the male involved in the disturbance.

While appellant was on the ground he was compliant, but upset and yelling. Officer Mulvihill heard a woman standing behind him say, " 'He pulled a gun' or something to that effect." Officer Mulvihill had no idea who the woman was talking about at the time. When he heard the mention of a gun, Officer Mulvihill went over to assist Officer Hillier in detaining appellant. Officer Mulvihill ordered appellant to put his hands behind his back, which appellant did, and then placed him in handcuffs. At this point in time, Officer Mulvihill was concerned for his safety. He admitted, however, that he had no idea whether anyone at the scene was armed.

Officer Mulvihill told appellant that he was being detained until he could "sort[] out the situation." At that time, everyone continued to yell obscenities and people were "advancing" on him, meaning they walked towards him and would not back up when asked. They were angry. Officer Hillier told the people on the stairwell to step back and they were yelling at him as well.

Officer Mulvihill told appellant that he was going to take him to his patrol car "to a safe location." At the patrol car, Officer Mulvihill asked appellant if he had any weapons and then explained to appellant that he was going to patsearch him. Officer

Mulvihill testified that he "wanted to make [appellant] safe before [he] put him" in the patrol car. On cross-examination, Officer Mulvihill testified that it is not uncommon for people to slip their handcuffs while in a patrol vehicle.

As Officer Mulvihill patsearched appellant he felt something in his right pocket. It was hard to the touch and bulky. Officer Mulvihill did not know what it was, but thought it was "likely more than one object." Officer Mulvihill removed the items from appellant's pocket in one motion. The items turned out to be a cell phone, a set of keys and a large bag of crack cocaine.

Officer Mulvihill testified that based on his experience "guns and knives come in different shapes and sizes." On cross-examination, he acknowledged that it was Officer Hillier that had pulled the gun and not appellant, but he did not know that at the time.

Appellant testified that it was Officer Hillier that pointed a gun at him; he complied with the officer's orders. When Officer Mulvihill searched him, the keys and cell phone were in his left pocket and the crack cocaine was in his right pocket. Officer Mulvihill took the cocaine out the right pocket first and then took the phone and keys out of the left pocket.

Appellant's counsel argued that there were several grounds upon which to grant the motion to suppress. First, there was no reasonable suspicion to handcuff appellant. Second, the search was improper because the officer had no reason to believe that appellant was going to pull out a gun.

The trial court denied appellant's motion to suppress. The court reasoned that Officer Mulvihill was faced with a "domestic disturbance. You have a guy albeit on the ground detained but yelling. You have other people yelling. You have people advancing on the officer and the officers. And so he does what -- and by the way, this is a detention situation. He hasn't sorted it out yet, so all he knows is that he has a potentially very serious situation and a gun may be on the scene. [¶] And quite frankly, common sense would tell you that's probably the most dangerous situation the officer can walk into.

And he does what he appropriately should do, and that is it's reasonable for him to handcuff the defendant at that time and get him out of the area. The officer stated, and I think he reflected credibility in his testimony, that the defendant was not being arrested but merely detained to sort out the situation and get him away from the scene so the officers -- because they were in a situation that I think reasonably they could fear potentially for their safety that he did what he did. [¶] Insofar as whether or not he went from one pocket and then to another, I actually believe the testimony of the officer. I see no reason why he's lying to me. He's stating things the way they occurred from his standpoint and he has no motive to lie to this Court. And he testified that before he put him in his patrol car he wanted to make sure he wasn't armed, which is also reasonable under the circumstances. [¶] Remember, I've already viewed the situation that the defendant was properly detained and pulled away from the area of agitation so the officers could safely sort out the situation, and certainly before he put him in his patrol car he had a right to pat search him. He felt a hard object that was not inconsistent with a weapon. He reached in, pulled out the object, and what came out with it was alleged contraband. And I think it's a reasonable search under the circumstances overall of the situation. And, of course, the atmosphere out there was not exactly calm and quiet."

#### *Discussion*

##### *Motion to Suppress*

Appellant contends that the "pat search of appellant was not supported by reason to believe that he was armed and dangerous and thus violated his Fourth Amendment right against unreasonable search and seizure, requiring suppression of the fruits of the search."

In our review of the trial court's ruling on a suppression motion, we affirm the factual findings that are supported by sufficient evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.) Independently, we determine whether the challenged search or seizure is constitutional within the Fourth Amendment. (*Ibid.*)

At the outset, it is important to note that appellant does not challenge the reasonableness of his detention or the fact that he was placed in handcuffs.<sup>1</sup> Accordingly, we confine our analysis to the reasonableness of the patsearch.

Warrantless searches are per se unreasonable pursuant to the Fourth Amendment subject to a few specifically established and well-delineated exceptions. (*Arizona v. Gant* (2009) --- U.S. ---- [129 S.Ct. 1710, 1716] (*Gant*).) Thus, the Fourth Amendment guarantees the right to be free of unreasonable searches and seizures by law enforcement personnel. (U.S. Const., 4th Amend.; *Terry v. Ohio* (1968) 392 U.S. 1, 8-9 (*Terry*).) Nevertheless, in *Terry*, *supra*, 392 U.S. at page 27, the United States Supreme Court determined that "there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger." However, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Id.* at p. 21, fn. omitted.) "[S]uch a

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<sup>1</sup> "Generally, handcuffing a suspect during a detention has only been sanctioned in cases where the police officer has a reasonable basis for believing the suspect poses a present physical threat or might flee. [Citation.] The more specific the information an officer has about a suspect's identity, dangerousness, and flight risk, the more reasonable a decision to detain the suspect in handcuffs will be. [Citation.] Circumstances in which handcuffing has been determined to be reasonably necessary for the detention include when: (1) the suspect is uncooperative; (2) the officer has information the suspect is currently armed; (3) the officer has information the suspect is about to commit a violent crime; (4) the detention closely follows a violent crime by a person matching the suspect's description and/or vehicle; (5) the suspect acts in a manner raising a reasonable possibility of danger or flight; or (6) the suspects outnumber the officers. [Citation.]" (*People v. Stier* (2008) 168 Cal.App.4th 21, 27-28.)

search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. [Citation.] The sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Id.* at p. 29.)

Appellant argues that here "there simply were no articulable reasonable circumstances to believe that [he] was armed and dangerous—despite the comment that indicated that someone had a gun."

In reviewing the Fourth Amendment reasonableness of an officer's conduct, we must consider the totality of the circumstances known to the officer when the search was conducted. (*Terry, supra*, 392 U.S. at p. 27; *People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*)). Thus, "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." (*Terry, supra*, 392 U.S. at p. 27.) "Reasonable suspicion must be based on 'commonsense judgments and inferences about human behavior.' [Citation.] The determination of reasonableness is 'inherently case-specific.' [Citation.]" (*In re H.M.* (2008) 167 Cal.App.4th 136, 143-144.)

Although officers may "give appropriate consideration to their surroundings and . . . draw rational inferences therefrom" (*Souza, supra*, 9 Cal.4th at p. 241), an officer may not conduct a patsearch if the officer has no other reason to suspect the person is armed. (*People v. Sandoval* (2008) 163 Cal.App.4th 205, 212.)

Here, Officer Mulvihill had reason to believe that someone was armed based on him hearing the two women say, " 'He pulled a gun.' " He testified, however, that while he was concerned for his safety he had no idea whether anyone was armed. Obviously, this includes appellant.

"[D]espite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters." (*Maryland v. Buie* (1990) 494 U.S. 325, 334, fn. 2.) "*Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted." (*Ibid.*) The circumstances known to Officer Mulvihill did not give rise to such a reasonable belief that appellant was armed. (See *People v. Medina* (2003) 110 Cal.App.4th 171, 177-178; see also *People v. Dickey* (1994) 21 Cal.App.4th 952, 956 [finding patsearch performed "for 'officer safety' and because appellant 'potentially may have been armed' " unlawful because there were no specific and articulable facts suggesting this person was armed and dangerous].)

Furthermore, there was no evidence appellant wore clothing that could be used to hide a weapon, and Officer Mullvihill did not describe any suspicious activity appellant was engaged in that might have given cause to believe he was armed. (Cf. *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1241 [suspect wore heavy coat and tried to return his hands to his pockets after being ordered to keep them out].)

Nevertheless, the need to transport a person in an officer's patrol vehicle creates an exigency that entitles the officer to conduct a limited search for weapons, even where the officer has no reason to believe the person is armed and dangerous. (*People v. Brisendine* (1975) 13 Cal.3d 528, 537 superseded by constitutional amendment on other grounds as stated in *In re Lance W.* (1985) 37 Cal.3d 873 [where "exigencies of the situation require that officers travel in close proximity with arrestees, a limited weapons search is permissible"]; *People v. Tobin* (1990) 219 Cal.App.3d 634, 641 [patdown of passenger justified before transport]; *People v. Mack* (1977) 66 Cal.App.3d 839, 848 [patdown search for weapons warranted by need to transport traffic misdemeanor to magistrate]; *People v. Ramos* (1972) 26 Cal.App.3d 108, 112 [patdown of suspected witness before transport was a sensible precaution; policemen have been attacked and killed by back seat passengers with concealed guns and knives].) In such a situation the

increased danger to the officer warrants the minor intrusion of a protective search. (*People v. Brisendine*, *supra*, 13 Cal.3d at pp. 537-538; *People v. Tobin*, *supra*, 219 Cal.App.3d at p. 641 [exigency and need for public safety supported minimally intrusive patdown].) " '[T]he officer risks the danger that the [person] may be armed with and draw a weapon. This danger is not necessarily eliminated by handcuffing the [person] as he may still be able to reach a weapon secreted on his person. And, incident to the entire process of transportation, it may be impossible for the officer to keep the [person] under constant surveillance by reason of the requirements of driving the vehicle and other responsibilities.' " (*People v. Brisendine*, *supra*. at p. 537, fn. omitted.)

Here, Officer Mulvihill testified that he was going to take appellant "to a safe location." This is one of those very rare cases where, absent probable cause for arrest, the removal of a suspect away from the initial encounter for further investigation is constitutionally permissible. (*People v. Harris* (1975) 15 Cal.3d 384, 390-391.) In *People v. Courtney* (1970) 11 Cal.App.3d 1185, 1191-1192 (*Courtney*), the investigating officer adjourned his interrogation of the suspect when a crowd of potentially hostile students gathered at the detention scene. He transported the suspect to a campus police department and resumed the interrogation there. The court held that "there was no Fourth Amendment compulsion on the police to choose between an on-the-spot continuation of their investigation at the probable cost of their own safety, *or* abandoning the investigation . . . ." (*Id.* at p. 1192.)

In this case there were special circumstances such as those present in *Courtney* that justified the pre-arrest transportation away from the scene of the initial encounter—as detailed *ante*, there was a threatening group of people yelling obscenities advancing on the officers.

Since Officer Mullvihill testified he was going to take appellant to a safe location, which similar to the trial court we interpret to mean that he was going to transport him in

his patrol car away from the scene, the patsearch of appellant for weapons was not constitutionally unreasonable.<sup>2</sup>

As to the scope of the search, when Officer Mulvihill patsearched appellant he felt something in appellant's right pocket that was hard to the touch and bulky. When a police officer's frisk of a detainee reveals a hard object that might be a weapon, the officer is justified in removing the object into view. (*People v. Brown* (1989) 213 Cal.App.3d 187, 192; accord, *People v. Limon* (1993) 17 Cal.App.4th 524, 535.) In so doing, Officer Mulvihill pulled out the contents of appellant's pocket in one motion and discovered the drugs.

In sum, the findings are supported by the evidence and those findings, in our independent judgment, supported the denial of appellant's motion to suppress.

#### *Probation Condition*

In addition to challenging the constitutionality of the patsearch, appellant contends that as a condition of probation he was ordered in part to " 'not associate with persons whose behavior might lead to criminal activities.' " Appellant argues that this condition is unconstitutionally vague and overbroad. If this condition had actually been imposed, we might agree with appellant. However, although the condition appears in the minute order of the June 30, 2009 hearing, and on the back of a form entitled "PROBATION/ CONDITION SENTENCE ORDER", this condition was never ordered by the court.

When the court pronounced judgment, the court stated the following. "Imposition of sentence will be suspended. Three years of formal probation under these terms. Obey all laws. Enter into and complete Prop 36 treatment program. Maintain gainful

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<sup>2</sup> This is the only reasonable interpretation of Officer Mullvihill's testimony that he was going to take appellant to his patrol car to a safe location. Since the patrol car was parked in the parking lot of the apartment complex, just around the corner from the scene of the initial encounter with appellant, the patrol car would have needed to move away from the parking lot in order to achieve a safer location.

employment and/or school. Participate in any educational, vocational, or therapeutic program as directed by probation. [¶] You must not discontinue the program without the approval of probation or program directors. Sign all waivers of confidentiality and pay all fees associated with the program. You must totally abstain from the use of alcohol and controlled substances. Not possess any paraphernalia for the use of ingestion of drugs. [¶] Submit to testing for the use of drugs or alcohol at any time by a peace or probation officer with or without a warrant. Submit your person, residence, vehicle, areas under your dominion and control to search and seizure at any time by a peace or probation officer with or without a warrant for drugs, alcohol, and contraband. [¶] Complete the AIDS education class. If you don't successfully complete the treatment program, you will have to register as a drug offender. There are 125 volunteer service hours to be done. And fines are \$30 critical needs facility fee, \$20 security fee, \$190 AIDS fine, \$190 lab analysis fee, \$150 drug program fee, and \$200 restitution fine all payable through probation. Do you accept these terms, sir?"

The court did not mention the condition with which appellant takes issue, nor did the court state that he was subject to other conditions contained in a written order. It is the general rule that the rendition of judgment is the oral pronouncement of sentence. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) The recording of the judgment and sentence in the minutes or in the abstract of judgment is a purely ministerial act done by the court clerk. If there is any discrepancy between the judgment as pronounced and the judgment as entered in the minutes, the judgment as pronounced governs. (*Id.* at pp. 471-472.) To put it another way, "The record of the oral pronouncement of the court controls over the clerk's minute order . . . . [Citations.]" (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [it is the oral pronouncement of probation conditions that informs a defendant's probation terms].) Accordingly, since the probation condition with which appellant takes issue was not orally ordered by the court, and was not otherwise incorporated by

reference in the court's oral probation order, he is not subject to it, and therefore, we need not and do not address this issue.

*Disposition*

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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McADAMS, J.